MMAA Newsletter

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Missouri Municipal League
1727 Southridge Drive
Jefferson City, MO 65109
(573) 635 - 9134

Editor Howard C. Wright
Assistant Editor Ragan K. Wright

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IMPORTANT MMAA NEWS/EVENTS

APRIL ISSUE: The April issue of the *Newsletter* will **not** be e-mailed, it will be mailed. The issue will include MMAA Dues Statement and information for the upcoming Summer Seminar in July.

MMAA SUMMER SEMINAR: The Missouri Municipal Attorneys Association Summer Seminar will be at Tan-Tar-A, July 13-15. We need your assistance in planning the program. Please send us your suggestions (by e-mail to gmarkenson@mocities.com or fax to 573-635-9009) for topics and speakers as soon as possible. If you do so, we can almost promise that you will not be arbitrarily assigned to present on the complex topic that will require extensive research. Also, we need a volunteer to moderate the breakout session for prosecutors, as well as ideas for topics and/or speakers for this session.

CASE OUTLINES (MISSOURI)

AFFIRMATIVE ACT NEEDED TO CLOSE RECORDS: The Missouri Board of Pharmacy (Board) sought to discipline Med4Home's pharmacy based on an investigation conducted by its investigator Glenski. The Board initiated an action before the Administrative Hearing Commission (AHC). Med4Home sought to obtain the personnel records of the investigator under the Sunshine law. After a hearing on the request for the records, the AHC ordered the Board to produce the personnel records of the investigator on the grounds that the records had not been closed. Two days after the AHC ordered the production of the records the Board closed the records. The Board sought and obtained a Writ of Prohibition against releasing the records in circuit court, which was appealed to the Western District. The Western District held that the AHC did not abuse its discretion because the Board had not closed the personnel records of the investigator at the time the AHC made its ruling. The Western District also held that records may be "reasonably calculated" to lead to relevant evidence; however, the AHC should first conduct an in camera review of the records to determine if they are relevant. *State of Missouri, ex rel., Missouri State Board of Pharmacy v. Administrative Hearing Commission John Knopp, Commissioner, Defendant, Med4Home*, (WD66401, 02/20/07).

Comment Howard: While the Sunshine law allows certain personnel records to be closed, the closing of the record is permissive; therefore, it is necessary to take an affirmative step to close these records. A governmental agency should include in its policy a statement that all records that can be closed under the Sunshine law are closed in order to avoid the situation described in this case. The MML forms prepared by Kevin O'Keefe and Pat Cronan contain this language.

The court avoids discussion of the issue that the record was closed after the request was made, by finding that the records need to be closed before a request is made. The court also seemed skeptical that all of the investigator's records were relevant by suggesting the AHC conduct an in camera inspection to determine relevancy before releasing the records. The holding that the AHC conduct an in camera inspection is interesting, suggesting to me that the court recognized that some sort of privacy right attaches to personnel records and that the request might just be a fishing expedition. To me the record was either open or closed under the Sunshine law.

DISPARTE TREATMENT IN TAUNTING CASE: Melissa Blessing was the sole female employee at a hardware and supply store. Her primary area of responsibility was at the gatehouse at the lumberyard area of the store. The work place could be described as filled with horseplay some of which had sexual connotations. A significant amount of the shenanigans were directed at Blessing, some of it certainly could be described as less than friendly. Blessing had a good rating as an employee. One day all of the other workers in the lumber yard (10 males) gathered around a truck urging Blessing to read the sign on the back of the truck. It read "show me you're boobies." After some taunting by the men and a supervisor, Blessing lifted her shirt exposing one side of her bra. When management learned of the incident they conducted an investigation reprimanded the principle instigator and fired Blessing. She filed a discrimination complaint with the MHRC alleging disparate treatment based on sex. The MHRC found for Blessing determining that the employer had discriminated against Blessing based on sex under a disparate treatment theory. The circuit court affirmed and the employer appealed to the Western District. The decision by the MHRC is affirmed by the Western District. *Buchheit, Inc. v. Missouri Commission on Human Rights*, (WD65985, 02/20/07).

STATE DISCRIMINATES AGAINST UNION EMPLOYEES: In 2003, the SEIU (union) and the department of corrections and the office of administration petitioned to have the personnel advisory board reposition probation and parole officer II to a higher pay level. This petition was denied. In November of 2003 after meeting with the union, office of administration, and department of corrections, the personnel advisory board decided to institute a step adjustment for probation and parole officer II that resulted in a pay increase for 1,100 employees ranging from $1044 to $1,596 with an average of $1,215 per year. This pay increase was effective December 1, 2003. In April of 2004, representatives from the office of administration met with members of the Senate and House budget committees. Members of the committee questioned the December 2003 pay increase and indicated an intent to "roll back" the 2003 pay increase by not including them in the 2004 across the board cost of living adjustment. The stated reason for excluding probation and parole officers II was that they had received a pay increase a few months earlier. In May of 2004, the Senate appropriations and House budget committees announced an across the board $1,200 cost-of-living pay increase except for those employees who had received a pay increase in December of 2003, although employees who received less than $1,200 in December of 2003 would get an adjustment for the difference. The union sued claiming that the exclusion of the probation and parole officers II was a violation of the statutory and constitutional right to engage in union activities of their members and a violation of state law that established uniform and equitable pay for employees. The union prevailed in circuit court with the court holding that there was a violation of the employees right to engage in union activity as shown by the "unprecedented" meeting between the office of administration staff and the Senate and House budget committee staff in which the Senate and House members expressed

a desire to "roll back" the 2003 pay increase. The circuit court noted that all other employees shared in the 2004 cost of living increase except for those who received the 2003 pay increase and that the state failed to establish a legitimate non-retaliatory reason for the denial. Most employees who got the 2004 across the board pay increase were nonunion while most of the employees who were denied the 2004 increase were union members. The circuit court ruled that there was no violation of the uniform and equitable pay requirements of state law. On appeal, the Western District held that while reasonable minds might differ there was sufficient evidence for the trial court to conclude that the state violated the right of employees to engage in union activity as protected by the Constitution and statute. Every year from 1994 to 2004 all classes of employees shared in the across the board cost of living increase. After the denial in 2004 union membership decreased. The Western District noted the unprecedented nature of the meeting with the House and Senate budget committee meeting and a letter for the chairs of the House and Senate committee to the office of administration. *Service Employees International Union Local 200, et al., v. State of Missouri*, (WD66255, 02/20/07).

ST. LOUIS POLICE ARE AGENTS OF THE STATE AND THE CITY: Kimberly Hodges's mother was killed in an automobile accident due to her vehicle being hit by a St. Louis police officer who was driving down a one-way street without his emergency lights or siren on. After her mother died, Hodges filed a wrongful death suit against the city of St. Louis. The jury found for the plaintiff in the amount of 1.2 million dollars, the award was reduced to the statutory cap of $335,118. On appeal, the issue before the Missouri Supreme Court is whether or not the police officer is an agent of the city or the board of police commissioners (a state board that runs the police department). Section 537.600.1 (1) contains an express waiver of sovereign immunity for actions arising out of the operation of motor vehicles "within their course of employment." Section 84.330 provides that all officers who are appointed by the police commissioners of St. Louis and Kansas City are officers of the city and of the state. The Supreme Court held that the police officers are agents of both the city and the state based on earlier cases. The Court refused to revisit the constitutionality of the statutory cap on liability. *Hodges v. City of St. Louis*, (SC87513, 02/27/07).

ST. LOUIS REQUIRED TO FUND POLICE AND FIRE PENSION BASED ON ACTUARIAL STUDY: The city of St. Louis Police Retirement System (PRS) and the Firemen's Retirement System (FRS) are administered by separate boards of trustees that hire an actuary to conduct a valuation of the retirement systems' assets and to calculate the City's annual contribution. Based on actuarial valuations these boards submit the contribution amount to the City's board of estimate and apportionment (E&A) who review and revise the City's yearly proposed budget and submits the budget for approval to the City's board of alderman. For 2003-04, the PRS certified that the City's payable amount was $9,500,000 and the City budgeted $4,100,000. For 2003-04, the FRS certified $8,900,000 and for 2004-05 $13,765,000. The amount adopted in the city budget was $1,884,000 for 2003-04 and $1,862,000 for 2004-05. The City contended before the Missouri Supreme Court that the mandates provision of the Hancock Amendment prohibits raising the amount above the 1981 amount which was the amount when the Hancock Amendment was adopted. The Court determined that the Hancock Amendment does not apply since the activity was not a new or increased activity. The actuarial formula has not changed since 1981. There is no mandate that the City take on a new responsibility by the state since the activity is a continuing activity. The City also argued that payment of these

amounts would violate Article VI, Section 26(a) by forcing the City to become indebted beyond its income. The City supported this argument by suggesting that a requirement to pay the entire amount has the possibility of impairing or destroying the City's other budgetary obligations. The City contends that giving the city board's unlimited power to determine the City's appropriations was an unlawful delegation of power and was void. The Court notes that the boards do not have unlimited power since an actuary is required to determine the calculations needed to fund the pensions. The City did not show that its expenses exceeded income only that it would have been required to make choices as to what programs to fund. The statute and the city ordinance are clear as to the funding obligations and cannot be evaded by the City. *Neske et al., v. City of St. Louis, et al., (consolidated with) Firemen's retirement system et al., v. City of St. Louis, et al.,* (SC87976 and SC87977, 03/13/07).

Comment Howard: This is a budgetary backbreaker creating a fiscal crisis in one of our major cities. I do not know if there are other statues similar to the St. Louis statute. You may want to check to see if state law or your city charter requires funding of local pensions at a certain level. For sure unions and retirees will certainly use this case wherever they can to get better funding for pensions which is a national issue for local government. Some very creative steps will need to be taken in St. Louis to avoid a fiscal crisis of monumental proportions.

WHAT IS A CRIME OF MORAL TURPITUDE? Lori Lee Brehe an employee of the Jefferson City School District taught learning disabled elementary students. On December 31, when school was out of session she left her home in Holt's Summitt and drove her three children ages 11, 10, and 2 to the parking lot at the Isle of Capri Casino in Boonville, Missouri. She left her three children in her car and went into the casino where she remained for 45 minutes. When she returned to her car the police had arrived having been notified by someone who observed the children in the car unattended by an adult. She was charged with a class A misdemeanor of endangering the welfare of a child in the second degree. The information alleged she acted with criminal negligence in a manner that created a substantial risk to the body and health of a child less than 17 years of age by leaving a child in a vehicle unattended for 45 minutes. She pled guilty to one count of second-degree child endangerment. The court suspended imposition of sentence and placed her on probation for one year which she successfully completed. On December 23, 2004, the department of elementary and secondary education (Board) filed a complaint against her based on her guilty plea to the charge. The Board contended that the charge that she pled guilty to was a crime of "moral turpitude." The Board held a hearing and temporarily suspended her teaching certificate for 90 days. The Board relied entirely on the record of her guilty plea to the charge that was filed against her. The Board's decision was appealed to circuit court where it was reversed on the grounds that the crime was not a crime of moral turpitude. The Board appealed the decision to Western District. The Western District held that endangering a child in the second degree is not on its face a crime of moral turpitude. Since the Board failed to focus on the circumstances of the crime, it failed to prove that the crime was a crime of moral turpitude. *Lori Lee Brehe v. Missouri Department of Elementary* (WD66267, 02/13/07).

Comment Howard: There are many laws which provide that a city official may be removed from office if he or she is found guilty of a crime of moral turpitude. This opinion goes into great detail about when a crime is a crime of moral turpitude. It is important to recognize that there is a category of crimes that require additional proof to show that it was a crime of moral turpitude.

VENUE FOR TORT IS IN THE COUNTY WHERE THE MUNICIPALITY IS LOCATED: Maurice Harris was engaged in a high speed chase with the police from Jennings that proceeded through Jennings into the city of St. Louis where an accident occurred resulting in his death. Ruth Harris filed a wrongful death action against the city of Jennings and the police officer in the city of St. Louis under RSMo 508.010.4 that provides "Notwithstanding any other provision of the law" in all actions in which there is any count alleging a tort, venue shall be in the county where the plaintiff was first injured. Jennings moved for a change of venue based on RSMo 508.050 that provides venue for a municipality is in the county where the municipality is located which would be St. Louis County. The circuit court did not grant the motion and Jennings filed a writ of mandamus to compel the court to grant the motion. On appeal, the Eastern District held that the motion should have been granted because venue was in the county in which the City is located under RSMo 508.050. Applying the rules of statutory construction, the court reasoned that when two statutes on the same subject matter are in conflict the more specific governs over the more general. In addition, the General Assembly did repeal other venue statutes when it amended the venue statute for torts but left the venue statute for municipalities intact. The court also ruled that under Rule 51.045(b) the opposing party must respond to the change of venue motion or it must be granted. *State of Missouri ex rel. City of Jennings, v. Honorable John J. Riley*, (ED88881, 03/06/07).

Comment Howard: Congratulations to Dudley McCarter for this victory in which we all share. Ivan Schraeder filed an amicus brief on behalf of the MML. This was very good lawyering since this case in my opinion could have gone either way.

CITY LIABLE UNDER DOCTRINE OF RESPONDEAT SUPERIOR: The city of St. Louis contracted with a company to do electrical work at Lambert Field. A city employee was negligent in disabling an electrical circuit and employees of the contractor were injured due to city employee's negligence. City's motion for summary judgment was sustained. Jury returned verdict against city employee and other defendants in the amount of $4,000,000 and the court apportioned fault. On appeal to the Eastern District, the court noted that the City is liable under doctrine of respondeat superior as set forth in *Davis v. Lambert-St. Louis Internat'l Airport* discussed in earlier *MMAA Newsletter* without regard to the fault of the City. *Daoukas v. City of St. Louis and Lacey,* (ED87350, 03/06/07).

OUTSOURCING OF OPERATING ENGINEERING JOBS PROHIBITED BY STATUTE: The Board of Education of the city of St. Louis cannot outsource permanent employees who maintain steam boilers under RSMo 168.291 because outsourcing is like a new appointment under statute. Employees laid off due to lack of work, insufficient funds, or reduction in school enrollment are on leave of absence until the age of 70 preventing new appointments. Missouri Supreme Court refused to reconsider *Sumpter v. City of Moberly* since the Board followed agreement to change policy. *Reichertet al., v. The Board of Education of the City of St. Louis* (SC87911, 03/13/07).

CASE OUTLINES (FEDERAL)

STEAK DINNER FOR ANY FELLOW POLICE OFFICER WHO CAN GET A CONVICTION ON MY BLACK NEIGHBOR: A lieutenant of the Minneapolis Police Department noticed graffiti in his neighborhood where he lived and asked a city expert if this

might be gang related. The lieutenant also noted that Flowers, an African-American, had recently rented a house in the area in the same block the lieutenant lived. The expert responded that the graffiti might be gang related and that a woman suspected of being a gang member lived at the Flowers' residence. The lieutenant asked if the patrol division could put Flowers' house on "directed watch" which involved going by and observing the Flowers' house and shining spot lights into the house. Flowers asserted his family was frightened and that one person withdrew her child from his day care, although this person later reenrolled, after learning from another source that the allegations were not true. At one point, the lieutenant made a standing offer of a steak dinner to any police officer who could provide evidence leading to conviction of anyone living at the Flowers' house or anything that led to an eviction. Flowers filed a lawsuit under 42 U.S.C. 1981 and 1983 alleging a deprivation of life, liberty, or property without due process of law and a violation of his substantive due process rights. In order to state a claim, it is necessary to show that the official violated one or more fundamental rights and that the conduct was shocking to the "contemporary conscience." The lieutenant and City filed motion for summary judgment. The district court concluded that Flowers did not establish an "actual deprivation of a life, liberty, or property right" for a procedural due process claim but did not discuss the right that was at stake in the substantive due process claim. On appeal of the denial of motion for summary judgment, the 8th Circuit held that no fundamental right was violated even though the actions taken by the officer may have amounted to harassment. The actions taken by the police did not rise to the level where the Flowers family was actually in danger of an "armed police raid or assaultive conduct." The motion for summary judgment should have been granted on the substantive due process claim. *Flowers v. City of Minneapolis and Stroll*, (8th Cir. No. 06-1672, 01/03/07).

LEGISLATION, NEWS, AND OTHER MATTERS

ETHICS OPINION ON LOBBYING BEFORE CITY AGENCY: The Missouri Ethics Commission recently responded to a request for an opinion (MEC Opinion No. 2007.031.L.007-6) opining that a lawyer who is specifically employed to influence a local elected official, and who in the course and scope of employment, meets with individual councilmembers in an attempt to influence the official qualifies as a elected local government official lobbyist under RSMo 105.470. A copy of the opinion can be obtained on the MML Web site, to *Attorney's Newsletter*, then click on MMAA Materials on the upper left. MML is still awaiting a response to its more specific request for an opinion on this issue.

AUDIO CONFERENCE: There will be a 60-minute audio conference on Wednesday, April 4, 2007, at 1:00-2:00 p.m., (ET) covering the *Most Common FLSA Pitfalls & How to Avoid Them*. The cost is $199. You may register by contacting http://www.ConstitutionConferences.com/flsa071x?ID=-1288122646.

ADULT ENTERTAINMENT: In *Encore Videos v. City of San Antonio*, 330 F.3d 288 (5th Cir. 2003), the Court of Appeals for the Fifth Circuit established a new distinction between sexually oriented businesses that provide onsite entertainment (e.g., strip clubs) and offsite businesses, those that sell or rent sexually oriented material exclusively for consumption elsewhere (e.g., adult book and video stores). The Texas City Attorney's Association has commissioned a study from nationally recognized experts on the negative effects of retail only SOBs and is raising

funds for the study. This study would be available to any city that needs it. For more information, please go to following link at http://www.texascityattorneys.org/ and click on the "Adult Business Study" link on the front page.

FCC REPORT AND AUDIO CONFERENCE: The Federal Communications Commission (FCC) on March 5, 2007, published its December 20, 2006, *Report and Order and Further Notice of Proposed Rulemaking* (FCC 06-180) that establishes rules and provides guidance to implement Section 621(a)(1) of the Communications Act of 1934, which prohibits franchising authorities from unreasonably refusing to award competitive franchises for the provision of cable services. A copy of the 109-page document is available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-180A1.pdf or at the FCC's Web site at http://www.fcc.gov/.

HOW TO OBTAIN OPINIONS

The material contained in this *Newsletter* is summarized as a service to MMAA members. Almost everything cited in the *Newsletter* can be found on the Internet. There are a variety of places to search for cases on the internet. Below are several sites that I use for searches. If you have questions or comments please feel free to email me at howardcwright@mchsi.com.

Missouri: http://www.courts.mo.gov/courts/pubopinions.nsf.,
Federal: http://www.ca8.uscourts.gov/onestop.html.
Other sources: www.findlaw.com and http://www.molawyersweekly.com/.

The opinions cited in this Newsletter may be subject to revision or withdrawal prior to publication.